BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MATTHEW M. OSTERHOUDT, Claimant, v. QUALITY TRUSS & LUMBER, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	)	**IC 01-520365** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed September 6, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Twin Falls on September 2, 2004. Claimant was present in person and represented by Dennis R. Petersen of Idaho Falls; Defendant Employer, Quality Truss & Lumber, Inc., and Defendant Surety, Idaho State Insurance Fund were represented by Neil D. McFeeley of Boise. The parties presented oral and documentary evidence. This matter was then continued for the taking of three post-hearing depositions, the submission of briefs, and subsequently came under advisement on April 13, 2005.

ISSUES

The noticed issues to be resolved as a result of the hearing are:

1. Whether Claimant suffered a personal injury arising out of and in the course of employment;

2. Whether Claimant's injury was the result of an accident arising out of and in the course of employment;

3. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

4. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof;

5. Whether Claimant is entitled to permanent partial impairment (PPI) benefits, and the extent thereof;

6. Whether Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of permanent impairment, and the extent thereof;

7. Whether Claimant is entitled to attorney's fees due to Employer/Surety's unreasonable denial of compensation as provided for by Idaho Code § 72-804;

8. Whether any of the benefits Claimant would normally be entitled to should be suspended or reduced pursuant to Idaho Code § 72-435; and,

9. Whether the Commission should retain jurisdiction beyond the Statute of Limitations.

At hearing, the parties agreed Claimant worked 40 hours per week, that he was paid $7.00 per hour, and that his average weekly wage (AWW) was $280.00, thereby resolving one of the noticed issues. (Transcript, pp. 26 and 218).

ARGUMENTS OF THE PARTIES

Claimant maintains, that since Defendants originally accepted his claim and paid medical, time-loss, and impairment benefits, they have either waived or should be estopped from now asserting that he was not injured in an industrial accident. He further argues, that even if the Commission finds waiver or estoppel does not apply, he has proven that he was injured in a November 30, 2001, industrial accident. Claimant also argues he is entitled to the surgical procedure recommended by Dr. Montalbano and time-loss benefits during the period he cannot work, or in the alternative, if the Commission finds he is medically stable, that he is totally and permanently disabled. He further argues he is entitled to attorney's fees for Defendants unreasonably contesting his right to additional benefits by belatedly raising the issue of whether he was injured in an accident.

Defendants argue Claimant did not claim he was injured in an industrial accident until after he saw Dr. Wimberley and realized his back problems were significant enough to obtain time-loss and disability benefits, and that only then did he and his family change their stories. They also cite the sworn testimony of Claimant's highly-reliable and credible co-workers who stated an accident did not occur on November 30, 2001. Defendants further argue that even if an accident did occur, Claimant at most aggravated his underlying symptomatic congenital back problems, and that he is not entitled to further surgery because Dr. Verst opined it would be "criminal" to contemplate such a surgery and because Dr. Montalbano has opined any re-fusion would fail due to Claimant's continued smoking; hence any further surgery would be unreasonable. They also argue Claimant has not demonstrated he is entitled to any disability since the only valid FCE was performed at LifeFit and he was found to be immediately capable of medium work, that Claimant has not

attempted to work and apparently prefers to continue his family history of attempting to live off of civil litigation, bankruptcy, and workers' compensation benefits. Defendants further argue Claimant continues the unsanitary or unreasonable practice of smoking and any benefits should be stopped under the legislative mandate of Idaho Code § 72-435. They also argue Claimant is not entitled to an award of attorney's fees since his claim is frivolous and based on misrepresentations and false claims. Defendants argue Claimant should be penalized for making a false claim when it was clear from surveillance that he has no disability.

Claimant responds that Defendants have forgotten Dr. Verst unequivocally opined, in response to Surety questioning, that Claimant's condition was caused by the industrial accident and not a pre-existing condition. He further argues Defendants' interpretation of Idaho Code § 72-435 is not supported by case law, and that Dr. Montalbano had scheduled the refusion and that Surety approved the procedure knowing full well that he smoked. Claimant again asks for the surgery proposed by Dr. Montalbano, time-loss benefits during his period of recovery, and that once he is medically stable, any disability that he may be entitled to.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Tralina Euresti, Daniel W. Euresti, David A. Osterhoudt, Shane Hall, Isaac E. Osterhoudt, Jonathan Osterhoudt, Mary Osterhoudt, Jacob R. Hammond, Anna M. Osterhoudt, DarWayne Osterhoudt, Terry Osterhoudt, Dale E. Miller, Bruce M. Hays, and Martin L. Koehn taken at the September 2, 2004, hearing;

2. Claimant's Exhibits 1 through 26 [Exhibit 5 is the deposition of Stephanie K. Benson taken on August 30, 2004 with Exhibits 1 and 2] admitted at the hearing;

3. Defendants' Exhibits 1 through 13 [Exhibit 2 is the deposition of Claimant taken on March 17, 2004, and Exhibit 3 is the deposition of Employer Jerre Hills taken on June 9, 2004] admitted at the hearing;

4. Joint Exhibit 1 [deposition of co-worker Bruce M. Hays taken by Claimant on June 9, 2004] admitted at the hearing;

5. The deposition of vocational rehabilitation consultant Kathy Gammon with Exhibits 1 and 2 taken by Claimant on September 27, 2004;

6. The deposition of Jerral B. Wimberley, D.C., taken by Defendants on September 28, 2004; and,

7. The deposition of Paul J. Montalbano, M.D., taken by Claimant on October 27, 2005.

Claimant's objections on pp. 25, 27, and 41 of Dr. Wimberley's deposition are sustained, his objection on p. 29 is overruled; Defendants' objections on pp. 32 and 33 are sustained, their second objection on p. 32 is overruled.

Defendants objections on pp. 28, 29, and 34 of Ms. Gammon's deposition are overruled, their second objection on p. 28 is sustained; Claimant's objections on pp. 68 and 69 are overruled.

After having fully considered all of the above evidence, and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of the hearing, Claimant was 24 years old and living in Filer. He has lived in the Magic Valley area all his life. Claimant graduated from Filer High School in 1998 and completed one year at the College of Southern Idaho in Twin Falls. His work history consists of

taking tickets at a movie theater, working at several large retail stores, as a pondsman at a fish hatchery, working at several grocery stores, as a railroad switchman, changing oil in vehicles, as a telemarketer, selling night crawlers, and as a nursing assistant at a care center. Most of the jobs were for a short period of time.

2. Claimant suffered a mid-back (thoracic area) sprain in an October 7, 1999, industrial accident. He also suffered a mid-back strain with spasm in a January 3, 2001, industrial accident. Both sprains/strains resolved and Claimant returned to work in his time-of-injury positions without restrictions.

3. Employer hired Claimant on June 15, 2001, as a truss builder and stacker at its Filer facility. Employer is a combination lumber yard, truss manufacturing plant, and hardware store. Claimant's immediate supervisor was Dale E. Miller. The full-time job paid $7.00 per hour.

4. Claimant maintains that on Friday, November 30, 2001, at approximately 2:30 p.m., he felt a sharp pain in his lower back while he and a co-worker were flipping a truss over. Claimant and the co-worker, Bruce M. Hayes, had been ordered to flip the trusses rather than use a mechanical device normally used to flip heavier trusses; the crew was behind schedule and the trusses could be flipped faster by hand. Claimant further maintains he told Mr. Hayes that he had a pain in his back, that he switched places with Martin L. Koehn, another co-worker, so that he did not have to flip any more trusses, and that he reported the incident to Mr. Miller when he left at 3:00 p.m., the end of his scheduled shift.

5. Mr. Miller denied Claimant told him that he hurt his back the afternoon of November 30, 2001.

6. Claimant maintains he spent Friday evening, all day Saturday, and all day Sunday

until bedtime in his father's living room recliner, getting up only to eat and use the bathroom, and that by Monday morning, December 3, 2001, he was in serious pain. He spent Sunday night in his own bed. Claimant lives with his parents.

7. Several of Claimant's relatives and friends testified they observed Claimant at various times over the weekend at his parents residence, that he, for the most part, spent the weekend in the recliner, and that he watched TV and played some video games.

A. Terry Osterhoudt, Claimant's mother, stated he arrived home around 3:10 p.m. on Friday afternoon, that he was in pain and limping, and that he told her he had hurt his back bending over to move a truss by hand. She further stated Claimant remained in his father's recliner all weekend, sleeping there on Friday and Saturday nights, and that he just sat watching TV or playing video games. Mrs. Osterhoudt also stated neither Claimant nor anyone else at the residence went snow tubing that weekend. She and her spouse were out of the house on Friday night.

B. Anna M. Osterhoudt, Claimant's sister, stated Claimant arrived home a little after 3:00 p.m. on Friday afternoon, that he could hardly walk, and that he told her that he had hurt his back at work. She further stated Claimant spent the evening in the recliner, getting up only to go to the bathroom, and that he was in the recliner when she got up around 8:00 a.m. on Saturday morning. Ms. Osterhoudt stated she was picked-up by her grandmother about 1:00 p.m. on Saturday afternoon to spend the night at her aunt's house, and that when she returned at approximately 4:30 p.m. on Sunday afternoon, Claimant was in the recliner.

C. DarWayne Osterhoudt, Claimant's father, stated he got up around 3:00 p.m. on Friday afternoon [he had worked the graveyard shift the night before], observed Claimant was in pain and in his recliner, and that he informed him that he had hurt his back while moving a truss by

hand. He further stated Claimant spent the weekend in the recliner, getting up only to go to the bathroom, and that he did not leave the house to go snow tubing.

D. Daniel W. Euresti, Claimant's cousin, stated he arrived at Claimant's residence late Friday afternoon to spend the weekend, that he observed him in the recliner, that he was tense, and that when asked, stated he hurt himself at work while lifting a truss. Mr. Euresti further stated Claimant spent most of the weekend in the recliner, that he had a hard time walking, and that he could not remember him leaving the house. Mr. Euresti was picked-up by his mother Sunday afternoon at approximately 4:00 p.m.

E. David A. Osterhoudt, Claimant's brother, stated he arrived home after 6:00 p.m. on Friday afternoon, that Claimant was in the recliner lying on an ice pack, and that he told him that he had hurt his back at work while loading trusses. He further stated Claimant stayed in the recliner pretty much the whole weekend moaning and groaning except to go to the bathroom, that he ate while in the chair, and that he did not go snow tubing that weekend.

F. Shane Hall, a friend of the Osterhoudt family, stated he arrived at their residence about 5:00 p.m. on Friday afternoon, that he observed Claimant in the recliner, and that he told him that he had injured himself when a truss he was flipping struck him.

G. Isaac E. Osterhoudt, Claimant's brother, stated he observed Claimant sitting in the recliner all weekend groaning and looking like he was in pain. He further stated Claimant did not leave the house during the weekend.

H. Jonathan Osterhoudt, Claimant's brother, stated Claimant spent the entire weekend at home and that he did not go snow tubing.

I. Jacob R. Hammond, a friend of Claimant, stated he arrived at Claimant's

residence around 11:00 a.m. on Saturday morning, that he observed him in the recliner, that he did not look right, and that he told him that he had hurt his back when a truss fell on him. He further stated Claimant remained in the recliner most of the day watching TV and playing video games. Mr. Hammond left around 2:00 a.m. on Sunday morning and returned around 1:00 p.m. that afternoon. He stated Claimant was still in the recliner and that they played more video games and watched TV until he left at 10:00 p.m. Sunday night. Mr. Hammond denied Claimant left the house or went snow tubing either day.

J. Mary Osterhoudt, Claimant's grandmother, stated she observed Claimant around noon on Saturday, that he was in pain, and that he was sitting in the recliner. She further stated Claimant told her that he hurt his back at work.

K. Tralina Euresti, Claimant's aunt, stated she saw him Sunday afternoon at approximately 4:00 p.m. sitting in the recliner in obvious pain, and that when asked, he told her that he had hurt his lower back Friday at work. Ms. Euresti denied Claimant injured his back snow tubing over the weekend, or that he told her that he actually hurt his back coughing on Saturday. She was there to pick-up her son Daniel.

8. Claimant reported for work at 6:30 a.m. on Monday, December 3, 2001, and maintains he informed Mr. Miller that he was sore from Friday. Claimant further maintains he was given light-duty work driving a fork-lift. At 9:30 a.m., Claimant went home during the morning break; the Osterhoudt residence was very close to Employer's facility. His Mother convinced him to see a doctor. Claimant then notified Mr. Miller that he was going to see a doctor. Mr. Miller reported that Claimant was going to see a doctor to Jerre Hills, owner.

9. At hearing, Mr. Miller acknowledged Claimant informed him the morning of

December 3, 2001, that he had hurt his back shortly after arriving for work, and that he left at 9:30 a.m. to see a doctor. Mr. Miller maintained Claimant did not tell him how he hurt his back, when he hurt it, or that it was an industrial claim.

10. Claimant saw Jerral B. Wimberley, D.C., the family chiropractor in Buhl later that morning. He had been seeing him since at least 1988. Dr. Wimberley, in filling out a workers' compensation medical report, indicated Claimant was injured on November 30, 2001, that building trusses bothered his back, and that a coughing episode the morning of Saturday, December 1, 2001, had set off his back pain. After examining and adjusting Claimant, he diagnosed a lumbosacral strain-sprain injury with neuralgia into the right leg, and a possible disk herniation. Dr. Wimberley further opined, that while the coughing may have set off Claimant's pain, due to the acute nature of the injury, there had to have been some prior damage. He gave Claimant a work-release. Claimant maintains his girl friend hand-delivered the release to Mr. Hills the afternoon of December 3, 2001; the girl friend had driven Claimant to and from Dr. Wimberley's office.

11. At hearing, Mr. Miller stated he spoke with both Mr. Hayes and Mr. Koehn after Claimant left to see the doctor, and that they told him Claimant had told them that he had hurt his back snow tubing over the weekend, and that he had also told them that he injured his back Friday afternoon at work. Mr. Miller further stated Claimant gave him the work-release from Dr. Wimberley at approximately 1:30 p.m. on Monday, December 3, 2001, and that he instructed Claimant to give the release to Mr. Hills. He acknowledged, despite hearing two different stories, and seeing the release stating it was a workers' compensation claim, that he did not ask Claimant how he injured his back.

12. After the work-release was delivered, Claimant maintains he returned home,

telephoned Mr. Hills, relayed Dr. Wimberley's instructions, and asked if he needed to come in and fill out an accident report.

13. Due to an increase in pain, Claimant saw Dan L. Nofziger, M.D., his family physician on Tuesday, December 4, 2001. He had been seeing Dr. Nofziger since at least 1986. Claimant reported that he had felt something snap in his back while lifting a truss on November 30, 2001, that he had been in bed over the weekend, and that he could not work. Dr. Nofziger diagnosed an acute lumbar strain, and prescribed complete bed rest and medications.

14. Claimant had seen Dr. Nofziger on November 24, 2001, after a potential hantavirus exposure while cleaning out a storage bin at Employer's facility. There is no indication of back pain in the chart note, or in two earlier notes from October 2001 when he lacerated his left thumb and required stitches in a work-related incident with Employer.

15. The afternoon of December 4, 2001, Claimant met with Mr. Hills and the two filled out a Form 1, Notice of Injury and Claim for Benefits. The Form 1 indicated Claimant noticed his lower back getting stiff on the preceding Friday while performing his normal work duties, that his condition got progressively worse over the weekend, and that by Monday morning, he was unable to work and needed to see a doctor. Both Claimant and Mr. Hills signed the Form 1.

16. At his pre-hearing deposition, Mr. Hills stated he asked Mr. Miller, Mr. Hayes, and Mr. Koehn about whether there were any events occurring on the prior Friday that they were aware of, and that all three indicated everything went fine, that everything was normal. He further stated Mr. Hays had told him that Claimant had told him that he [Claimant] had gone snow tubing over the weekend. Mr. Hills also acknowledged that he had not directly asked Claimant to clarify exactly what caused his low back pain. Mr. Hills also believed Claimant's girl friend gave him the work-

release from Dr. Wimberley the afternoon of December 3, 2001. This belief matches Claimant's testimony.

17. At his pre-hearing deposition, Mr. Hays stated he worked with Claimant all day on November 30, 2001, and that Claimant had neither told him that he hurt himself, nor had he seen Claimant hurt himself that day. He further stated he saw Claimant walking quickly to his vehicle at the end of their shift that afternoon. Mr. Hays also stated Claimant told him on the morning of Monday, December 3, 2001, that he had been tubing over the weekend and that his back was hurting. He further stated both Mr. Hills and Mr. Miller had told him that Claimant had been injured at work, but that no one had asked him how Claimant might have hurt himself.

18. At hearing, Mr. Hays stated he did not observe anything that would indicate to him that Claimant hurt his back at work on November 30, 2001. He further stated he did not remember seeing Claimant at work on Monday, December 3, 2001, that he did not speak to Mr. Miller that day about Claimant hurting himself, that Claimant never told him that he hurt his back snow tubing over the weekend, but that he heard Claimant tell an unknown person that he had hurt his back over the weekend. Mr. Hays also maintained that on Sunday, December 2, 2001, Claimant came over to his house, told him that he had hurt his back, and asked him to say that he [Claimant] was hurt at work on Friday, November 30, 2001.

19. At hearing, Mr. Koehn stated he did not observe or hear anything that would indicate to him that Claimant hurt his back at work on Friday, November 30, 2001. He further stated that he observed Claimant, apparently in pain the morning of Monday, December 3, 2001, but that he did not speak to him. Mr. Koehn also stated he could not recall having a conversation with Claimant the morning of December 3, 2001, in which Claimant told him that he had hurt his back at home. He

also could not recall anyone asking him whether Claimant had been injured at work.

20. At her pre-hearing deposition, Stephanie K. Benson, a claims adjuster for Surety, stated that after an investigation of Claimant's claim for compensation was completed by Jeff McDermott, a staff claims investigator, she was unsure whether the claim was compensable, and that she referred it to her supervisor, who then sent it to an in-house attorney. She further stated the decision to accept Claimant's claim was made after discussions between the in-house attorney and management, that the decision to accept the claim was based on the attorney's advice, that she was not privy to any of the discussions, and that her involvement in the case ended when she referred it to her supervisor.

21. Mr. McDermott interviewed several individuals during his investigation. The pertinent part of their statements, as recorded by Mr. McDermott in his December 24, 2001, report are as follows:

A. Claimant indicated he was flipping trusses to get a shipment together the afternoon of Friday November 30, 2001, that his back became sore and stiff as he flipped the trusses, and as his condition worsened, he notified Mr. Miller of his pain. He further indicated he spent the weekend at home lying down.

B. Mr. Hills indicated Mr. Miller informed him the morning of Monday, December 3, 2001, that Claimant had left to see a chiropractor for a sore back, and that Mr. Miller had no further information. He further indicated Claimant told him the afternoon of December 3, 2001, that his [Claimant's] back had become stiff the proceeding Friday while at work and that he wanted to fill out a workers' compensation claim. Mr. Hills also indicated Claimant returned to work the following day, December 4, 2001, and that a Form 1 was completed. He then offered his

opinion that Claimant had not identified a specific incident as the cause of his back problem.

C. Mr. Miller also indicated he was not aware of any specific incident in which Claimant injured his back on November 30, 2001, that he exhibited no outward appearances of pain when he left work that afternoon, but that when he appeared for work on Monday morning, December 3, 2001, he exhibited indications of back pain and discomfort. Mr. Miller further indicated he overheard Claimant tell Mr. Hayes the morning of December 3, 2001, that he had hurt his back while at home on Saturday, December 1, 2001, but that no specific incident was mentioned. He then offered his opinion that there was no specific event on November 30, 2001, during which Claimant injured his back while at work.

D. Mr. Hayes indicated he was unaware of any specific event on November 30, 2001, in which Claimant injured his back while at work, and that he exhibited no signs of a back injury that day. He further indicated he overheard Claimant tell Mr. Miller the morning of December 3, 2001, that his back was sore and bothering him, and that he had injured his back over the prior weekend. Mr. Hayes also indicated he was suspicious of Claimant's claim.

22. Mr. McDermott also contacted individuals during a follow-up investigation. The pertinent part of their statements, as recorded by Mr. McDermott in his January 10, 2001, report are as follows:

A. Mr. Miller indicated Claimant and Mr. Hayes had built 27 to 28 trusses and later flipped the trusses over by hand the afternoon of November 30, 2001. He further indicated the biggest truss flipped was 24 feet long, four feet tall, and weighed approximately 35 to 37 pounds. Mr. Miller also indicated, that at no time while flipping the trusses, had Claimant mentioned that he had injured his back while performing the procedure.

B. Mr. Koehn indicated he was not aware of any accident involving Claimant on November 30, 2001, but acknowledged Claimant and Mr. Hayes were flipping trusses by hand because it was faster than using a machine. He further indicated Claimant told him the morning of December 3, 2001, that he had injured his back from having coughed really hard after work the evening of November 30, 2001. Mr. Koehn also indicated Claimant could have possibly hurt his back while flipping trusses, but questioned why he did not mention it at the time.

23. Claimant returned to Dr. Nofziger on December 17, 2001. He noted Claimant was showing improvement, that he was beginning physical therapy, and that a MRI showed degenerative joint disease (DJD) at L5-S1, but that there was no evidence of any encroachment or herniated disk.

24. On December 27, 2001, Dr. Nofziger noted Claimant was not improving with physical therapy, that the MRI showed pars interarticularis defect at L5-S1 with a slight anterior subluxation of L5, S1, in addition to the DJD. He stopped Claimant's physical therapy, continued the work restrictions, and noted he was to see Frederick L. Surbaugh, M.D.

25. Claimant saw Dr. Surbaugh, a Twin Falls orthopedic surgeon, at Dr. Nofziger's request on January 3, 2002. Dr. Surbaugh noted Claimant suffered a work injury lifting heavy trusses on November 30, 2001, that his pain had been episodic, but that it was now centered in his low back with radiation into his buttocks and posterior thighs. After reviewing the MRI and x-rays he ordered, Dr. Surbaugh diagnosed spondylolysis at L5-S1 with first or mild secondary degree spondylolisthesis, and opined it was obvious Claimant had an underlying condition which was aggravated by his work injury. He further opined Claimant's prognosis was guarded because of the severity of his symptoms. Dr. Surbaugh referred Claimant to David B. Verst, M.D.

26. Claimant filed a Workers' Compensation Complaint in this matter on January 3,

2002.

27. Claimant saw Dr. Verst at the Sun Valley Spine Institute on January 8, 2002. Dr. Verst noted Claimant's symptoms of severe back pain and stiffness began when lifting trusses at work. He diagnosed mixed spondylolisthesis, DJD, and spinal stenosis, and recommended conservative care for one month.

28. In a letter to Claimant dated January 25, 2002, Surety accepted his claim for compensation and asked that he sign a stipulation to dismiss his Complaint without prejudice. The Complaint was dismissed by the Commission on July 23, 2002. No Answer had been filed.

29. Claimant's condition did not improve with conservative care. On February 5, 2002, Dr. Verst recommended a L5-S1 fusion.

30. In response to an inquiry from Surety, Dr. Verst, in a letter dated February 19, 2002, opined the act of turning the trusses precipitated Claimant's debilitating, incapacitating back pain, that it was confirmed by the MRI which showed pars interarticularis fracture with edema, and that if those had not been present, he would have been thinking more in terms of Claimant's injury as congenital isthmic spondylolisthesis. He further opined coughing or any other small energy mechanism could not have created such an unstable level. Claimant's surgery was subsequently approved by Surety after a review by a staff physician.

31. Dr. Verst subsequently performed an anterior/posterior interbody fusion, diskectomy, and laminectomy on Claimant at St. Lukes Wood River Medical Center in Ketchum on March 20, 2002. His post-operative notes indicated he found instability at the L5-S1 level with an associated degenerative disk at L5-S1, obvious par fracture at the L5 level, spondylosis, and profound nerve root entrapment left greater than the right. Dr. Verst opined Claimant's condition was triggered by a

work-related injury.

32. Physical therapy followed the fusion. Over the next several months Dr. Verst noted several incidents occurring during physical therapy which increased Claimant's pain. X-rays showed slow progression of the fusion; Dr. Verst attributed the slow progress to Claimant's smoking. On September 23, 2002, he recommended Claimant attend the LifeFit program in Boise. Dr. Verst noted the surgery was successful from the point it alleviated Claimant's leg pain, but that he still had a moderate amount of back pain likely related to the fact that he had not fused. He attributed the nonunion to Claimant's smoking. On October 14, 2002, Dr. Verst opined Claimant's outcome was protracted, and that it would be at least one year before he would be medically stable.

33. Claimant attended the four week LifeFit program at St. Lukes – Idaho Elks Rehabilitation Services in Boise from mid-October through mid-November 2002. It was noted he was fully compliant with the program. Prior to completing the program, Claimant was given a functional capacity examination (FCE) which indicated he could return to work at the light to medium work level. The FCE was deemed valid. Claimant was also assigned a DRE Lumbar Category IV PPI rating of 20% of the whole person with no apportionment. The rating was taken from the AMA *Guides*. Both opinions were given by Robert H. Friedman, M.D., the program's medical director. Dr. Friedman also opined Claimant could not return to his prior position with Employer, but that as of December 1, 2002, he could return to work as cashier/clerk, telephone interviewer, a sandwich maker, or a sales clerk. Positions processing fish, as a janitor, and as a grocery store checker were not approved.

34. The job site evaluations for the various positions had been prepared by David M. Duhaime, a consultant with the Industrial Commission's Twin Falls Rehabilitation Division. Surety

had requested Mr. Duhaime's assistance in returning Claimant to work.

35. After Claimant completed the LifeFit program, Dr. Verst noted he was doing remarkably well, that he was off all medications, that his pain was moderate, and that x-rays showed fusion. On December 16, 2002, he noted Claimant would be continuing his rehabilitation at home, that he would give him an impairment rating in two months, and that Claimant was going to return to school. On January 13, 2003, Dr. Verst opined Claimant was medically stable and noted that he had already been given a PPI rating.

36. Claimant returned to Dr. Verst within weeks complaining of numbness over his big toe which by March 2003 included his right foot and buttocks. X-rays of L5-S1 were interpreted to show a solid fusion. A MRI was also read as unremarkable. Dr. Verst noted he was unable to find any pathological lesions which would explain Claimant's persistent right leg ache. In April 2003 Claimant began complaining of a metallic taste in his mouth.

37. On June 9, 2003, Dr. Verst noted nerve conduction studies were negative for any evidence of nerve root entrapment. He recommended the removal of the hardware in Claimant's back to eliminate a possible source of his pain; Claimant agreed, he felt the hardware was contributing to his pain. Surety deferred on the surgical request until a second opinion could be obtained.

38. At Surety's request, Claimant saw Paul J. Montalbano, M.D., on July 9, 2003, for the second opinion. Dr. Montalbano, a Boise neurological surgeon, felt Claimant was suffering from a pseudoarthrosis which was contributing to his pain. He ordered a CT myelogram and x-rays for diagnostic purposes.

39. In Dr. Montalbano's absence due to an emergency, Claimant saw Michael V. Hajjar,

M.D., on August 1, 2003. Both physicians are in the same office. Dr. Hajjar, after reviewing the diagnostic films, opined Claimant's fusion was likely incomplete. He further opined pseudoarthrosis was a painful condition in many people. Dr. Hajjar offered Claimant two options: do nothing and see how things progress over time, or remove the hardware and re-explore the fusion. He also noted that he had discussed Claimant's case with Dr. Montalbano.

40. Based on Dr. Hajjar's recommendation, Surety scheduled the recommended surgical procedure for September 2, 2003; Dr. Montalbano was to perform the procedure.

41. In a August 20, 2003, recorded telephone message, Dr. Verst informed Surety Claimant had a solid fusion and that it would be an absolute disaster and criminal if Claimant had a re-fusion. He strongly recommended a third opinion.

42. There is nothing in the record to indicate anyone followed-up with Dr. Verst and ascertained a basis for his opinion.

43. Surety decided not to authorize the recommended surgery because of Dr. Verst's objection, and because Dr. Montalbano only saw Claimant for a second opinion.

44. Claimant filed a second Workers' Compensation Complaint on August 22, 2003.

45. The parties agreed Claimant would see Timothy E. Doerr, M.D., for a third opinion.

46. Claimant saw Dr. Doerr, a Boise orthopedic surgeon, on October 16, 2003. After reviewing Claimant's medical records and performing a physical examination, Dr. Doerr opined Claimant had an anterior-posterior fusion with probable nonunion and multiple nonorganic signs. He further opined Claimant had multiple organic issues which he believed would not improve with a re-fusion, but that on the other hand, consideration of repairing his fusion was not without merit. Dr. Doerr also indicated he would not be willing to operate on Claimant unless his workers'

compensation claim was settled in order to remove any secondary gain issues.

47. At his own initiative, Claimant underwent a second FCE in December 2003 with D. Dean Mayes, M.H.S., P.T., in Twin Falls. Mr. Mayes opined Claimant was capable of light work on a limited basis, that he could work for one hour in an eight hour day, and that he would also have difficulty working at the sedentary work level because of his intolerance to standing or sitting for very long. He further opined Claimant showed some signs of symptom magnification.

48. Defendants filed an Answer on February 23, 2004, denying that Claimant had been injured in an industrial accident. They did, however, continue paying PPI benefits until September 1, 2004, at which time the 20% PPI rating given by Dr. Friedman had been paid in full.

49. At his own initiative, Claimant underwent a third FCE on March 25, 2004, with Bryan D. Huntsman, M.S., P.T., in Idaho Falls. Mr. Huntsman opined Claimant was capable of light work in most material handling activities except lifting from ground level, that he could never climb, squat, crawl, or balance on his right leg, and that he should change posture every five to ten minutes. He further opined Claimant had no restrictions relative to hand function other than posturing his back in order to use his hands.

50. Surety retained the Custer Agency of Boise to conduct *sub rosa* surveillance of Claimant during April and May 2004. During the course of the investigation, Claimant was only observed on two occasions with activity limited to driving a motor vehicle and walking for a short period of time.

51. In a July 13, 2004, letter to Surety's counsel, Claimant's counsel indicated Claimant would like to proceed with the surgery recommended by Dr. Montalbano, and asked Surety to pay for the surgery. In a response dated July 22, 2004, Surety's counsel indicated Surety would not pay

for the surgery based on the opinion of Dr. Verst and Dr. Doerr, and that Surety intended to contest causation at hearing based on the testimony of Claimant's co-workers.

52. At his attorney's request, Claimant underwent a vocational assessment by Kathy Gammon, C.R.C., M.P.T.; her report is dated August 10, 2004. Ms. Gammon, an Idaho Falls vocational rehabilitation consultant, opined Claimant, due to his residual functional capacity, was precluded from all his previous work, that he had minimal transferable skills applicable to alternate work, that he would likely experience significant difficulty obtaining the necessary work accommodations to become employed, and that he was likely restricted to odd-lot or sheltered work positions at the light exertional level of work. She further opined Claimant has experienced a loss of access to employment and a loss of earning capacity due to his physical restrictions.

53. At his post-hearing deposition, Dr. Wimberley indicated Claimant saw him on December 3, 2001, for back pain, that Claimant told him that lifting trusses had caused his back to hurt in the past, but that a coughing incident the prior Saturday had set the pain off. Dr. Wimberley further indicated he did not see how it was possible a cough could have been the sole cause of Claimant's low back condition, and opined there had to have been some pre-existing damage due to lifting that would have made the injury so acute.

54. At his post-hearing deposition, Dr. Montalbano indicated his examination of Claimant showed a compressed nerve root going down his right leg causing pain, sensory loss in his right L5 distribution, and an antalgic component of his gait. He opined the radiographic diagnostic studies he ordered showed the bone graft placed at L5-S1 did not fuse, and that the left L5 pedicle screw had lucency or loosening around it, both implying pseudoarthrosis or non-fusion. Dr. Montalbano further opined his diagnosis at the time of his examination was a pseudoarthrosis related

from his prior operation at L5-S1, and that it was the etiology of his back pain. He indicated he later recommended a refusion, that the procedure was scheduled for September 2, 2003, but was cancelled the day before by Surety due to a disagreement between doctors.

55. Dr. Montalbano further opined Claimant would need to undergo another examination with diagnostic studies prior to any surgical procedure due to the 15 month time delay from his prior examination, and that if the studies were the same, he would recommend Claimant undergo a redo fusion at L5-S1 with removal of the instrumentation in order to stabilize his spine at L5-S1 and decrease his pain. He also opined Claimant would have to stop smoking prior to any refusion, and that more likely than not, his pseudoarthrosis was caused by his smoking. Dr. Montalbano indicated the instruments used to stabilize a fusion are only good until the fusion heals when they become superfluous, but that if there is pseudoarthrosis, the instrumentation will come loose and eventually break. He opined the foremost cause of pseudoarthrosis dealt with how the technical aspects of the fusion were performed, but that in young people, smoking was also a significant causative factor.

56. Dr. Montalbano also opined any patient who had no neuropsychological issues and did not use tobacco products, deserved an operation to stabilize his back; he deserved to have the goal of the first operation [fusion] completed, because the goal of the second operation is the same as the goal for the first. He further opined Claimant's instrumentation would eventually fail and then would need to be revised if his symptoms persisted, and that the revision of taking out failed hardware is much harder than it is to take care of a pseudoarthrosis.

57. At her post-hearing deposition, Ms. Gammon, citing Claimant's two 2004 FCEs, opined he was precluded from returning to any of his pre-injury positions, and that he was now only capable of sedentary or selected light activities. She further opined it would be unlikely Claimant

could work at the light level because of his physical restrictions, and that any employment at this level would more than likely be in a sheltered environment, a workshop-type position. Ms. Gammon opined it would be difficult for Claimant to perform sedentary work on a production line due to his restrictions against repetitive work for a sustained period of time and the need to frequently change positions. She also pointed out Claimant never demonstrated the ability to lift at the medium work level in his FCE at LifeFit even though he was given light to medium work restrictions.

58. Ms. Gammon further opined Claimant was capable of either unskilled or semi-skilled sedentary work with work accommodations to change positions, but that the chance of placing him in an actual job was slim. She also opined Claimant was restricted to 3.5% of his available labor market [south central Idaho which includes Twin Falls county] or a 96.5% loss of access to his labor market due to his physical restrictions. Ms. Gammon opined training could increase his sedentary skills and result in more job opportunities. The majority of her work is performed for insurance companies.

59. Claimant has not worked since November 30, 2001. He has neither attempted to work nor looked for work.

DISCUSSION

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1. **Injury/Accident (Causation).** The Idaho Workers' Compensation Law defines injury as a personal injury caused by an accident arising out of and in the course of employment. An

accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102 (17).

A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *See, Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001). The Idaho Supreme Court has long held that an employee may be compensated for the aggravation or acceleration of his/her pre-existing condition, but only if such aggravation results from an industrial accident as defined by Idaho Code § 72-102 (17). *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 132, 879 P.2d 592, 595 (1994).

Here, Defendants ask the Commission to affirm their decision to deny Claimant's claim for compensation after having accepted it, and after paying significant benefits, including a lumbar

fusion, time-loss, and a 20% impairment rating. Citing the testimony of his co-workers, Defendants assert the November 30, 2001, industrial accident Claimant maintains caused his low back injury did not occur. Claimant counters Defendants should be either estopped from changing their position at this late date, or in the alternative, that they have waived the defense.

It would appear from the record presented that Surety thoroughly investigated Claimant's claim. Questions over whether an accident occurred were raised by Ms. Benson. She reported her concerns to her supervisors. A staff investigator was tasked to investigate the matter. His investigation raised more questions concerning whether or not an accident occurred. It did show, however, that Claimant was flipping trusses the afternoon of November 30, 2001, the specific act he maintains caused his back injury. Dr. Verst's opinion was sought by Surety and he provided the requisite medical causation. On the advise of in-house counsel, Surety accepted the claim and after review by an in-house physician, approved the surgical procedure recommended by Dr. Verst. It was not until the specter of an additional surgery and/or significant disability above impairment arose that Surety decided to reverse their position and deny Claimant's claim.

The testimony of Claimant's co-workers in this matter is enlightening: Mr. Hills stated at his pre-hearing deposition that Mr. Hays told him Claimant went snow tubing over the weekend. At hearing, Mr. Miller stated he spoke with both Mr. Hayes and Mr. Koehn after Claimant left to see Dr. Wimberley the morning of Monday, December 3, 2001, and that they both told him Claimant had told them he had hurt his back over the weekend, and that he had also told them that he injured his back the previous Friday afternoon at work. Mr. Miller had earlier informed Mr. McDermott he had overheard Claimant tell Mr. Hayes the morning of December 3, 2001, he had hurt his back at home the prior Saturday, although no specific event was mentioned.

Mr. Hays told Mr. McDermott he overhead Claimant tell Mr. Miller his back was bothering him the morning of Monday, December 3, 2001, and that he had injured it the prior weekend. At his pre-hearing deposition, Mr. Hayes stated Claimant told him Monday morning he had been snow tubing over the weekend, and that his back was hurting. At hearing, Mr. Hayes stated he could not recall seeing Claimant at work on Monday morning, that he did not speak to Mr. Miller about Claimant hurting himself, that Claimant never told him that he had hurt his back snow tubing over the weekend, but that he heard Claimant tell an unknown person that he had hurt his back over the weekend. In addition, Mr. Hays stated Claimant came over to his house on Sunday, December 2, 2001, told him that he hurt his back at work on Friday, and asked him to support his story.

The Referee notes numerous witnesses place Claimant at his residence all day Saturday and Sunday, calling into question whether he either went snow tubing or over to Mr. Hayes' house. The Referee further notes both Mr. Hills and Mr. Miller maintain they did not specifically ask Claimant how he injured himself. It seems a simple question to ask when reporting an injury.

Mr. Koehn told Mr. McDermott Claimant told him the morning of December 3, 2001, that he had hurt his back coughing really hard the evening of November 30, 2001. At hearing, he stated that he did not speak to Claimant on Monday morning, and that he could not recall having a conversation with him in which Claimant told him that he had hurt his back at home.

The Referee finds the witnesses Defendants would have the Commission rely on contradict not only themselves, but also each other. Moreover, Employer chose not to fully investigate Claimant's claim. This in itself raises further questions about what actually transpired. The Referee further finds Defendants' witnesses are not credible.

The burden of proof is on Claimant to prove he was injured in an accident. He maintains he

injured his low back turning trusses the afternoon of November 30, 2001, at Employer's facility. The record indicates he was engaged in turning trusses that afternoon. Numerous witnesses, albeit all relatives and friends, place Claimant at his parents' residence in his father's recliner all weekend in pain. He reported he was hurt to Employer the morning of December 3, 2001. In addition, Claimant sought medical care that morning. A Form 1 was filled out on December 4, 2001. Surety investigated the matter and accepted Claimant's claim. Defendants' witnesses have advanced so many contradictory stories that none of them can be believed. The Referee finds Claimant injured his lower back while flipping trusses the afternoon of November 30, 2001, at Employer's facility. In so finding, the Referee notes Dr. Verst's February 19, 2002, letter to Surety points to a specific traumatic incident as the cause of Claimant's injury. The Referee further notes the coughing incident has been disposed of by both Dr. Wimberley and Dr. Verst. Thus, the Referee concludes Claimant injured his lumbar spine in a work-related accident on November 30, 2001, for which he is entitled to compensation.

2. **Medical Benefits.** The employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). The Idaho Supreme Court has held that for the purposes of Idaho Code § 72-432 (1), medical treatment is reasonable if the employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. *Mulder v. Liberty Northwest Insurance Company*, 135 Idaho 52, 58, 14 P.3d 372, 378 (2000).

Claimant seeks the surgical procedure recommended by Dr. Montalbano. Dr. Montalbano has clearly opined the need for the refusion was the failure or pseudoarthrosis of Claimant's fusion at L5-S1. His opinion is supported by that of Dr. Hajjar who also examined Claimant. Dr. Doerr opined consideration of the procedure was not without merit since it was probable Claimant had a pseudoarthrosis. He too examined Claimant and reviewed the films ordered by Dr. Montalbano. The only opinion to the contrary is that of Dr. Verst, and no one bothered to ask him the basis for his opinion, although it would appear from his comments that he believed the fusion was solid; he also may not have had access to the films ordered by Dr. Montalbano. The Referee finds the procedures recommended by Dr. Montalbano to be reasonable. Thus, the Referee concludes Claimant is entitled to the diagnostic and surgical procedures recommended by Dr. Montalbano.

Defendants have raised the injurious practices issue by maintaining Claimant's continued smoking has contributed to his L5-S1 pseudoarthrosis. Idaho Code § 72-435 provides that "[i]f an injured employee persists in unsanitary or unreasonable practices which tend to imperil or retard his recovery the Commission may order the compensation of such employee to be suspended or reduced." Dr. Montalbano attributed Claimant's pseudoarthrosis to his smoking. The Referee finds the diagnostic and surgical procedures recommended by Dr. Montalbano will not benefit Claimant until such time he ceases to smoke. Thus, the Referee concludes these procedures are suspended until such time Claimant stops smoking.

3. **Remaining Issues**. Based on the above conclusions, the Referee further concludes the remaining issues before the Commission are not ripe. Consequently, jurisdiction in this matter is retained.

CONCLUSIONS OF LAW

1. Claimant injured his lumbar spine in a work-related accident on November 30, 2001, for which he is entitled to compensation.

2. Claimant is entitled to the diagnostic and surgical procedures recommended by Dr. Montalbano.

3. The diagnostic and surgical procedures recommended by Dr. Montalbano are suspended until such time Claimant stops smoking.

4. The remaining noticed issues before the Commission are not ripe. Consequently, jurisdiction in this matter is retained.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends the Commission adopt such findings and conclusions as its own, and issue an appropriate final order.

DATED This 16th day of August, 2005.

INDUSTRIAL COMMISSION

/s/_____
Robert D. Barclay
Chief Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __6th_____ day of __September____, 2005, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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